

Excerpt from an article written by Professor David Wilkins, “Deconstructing the Doctrine of Discovery,” October 24, 2014, published by Indian Country Today Media Network

“Again, were we to inquire by what law or authority you set up a claim [to our land], I answer, none! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations, and they are both against you.”— Corn Tassel (Cherokee, 1785)

... Left unchallenged, the myths generated [by Discovery] pose grave threats to our identities as peoples with inalienable sovereign rights to governance and territory.

Discovery, as originally conceived in Pope Alexander VI’s 1493 papal bull, granted the Spanish exclusive interests in the Americas.

In reality, the absolute denial of Native land rights was replaced less than fifty years later when Charles V, the devoutly religious Spanish emperor, sought the advice of Francisco de Vitoria, a prominent theologian, as to what rights the Spanish could legally and morally claim in the New World. Vitoria ... declared that Native peoples were the true owners of their lands.

Subsequent legal and political relations between Native nations and competing European powers ... were generally based on this philosophical understanding of Natives as true landowners. Treaty-making between tribal nations and Europeans, and later the U.S, affirmed that Native peoples were recognized as land-owning nations.

In reality, the discovery doctrine ... was only sometimes referenced during much of the colonial period as land was bought [and] sold ... with the understanding that indigenous peoples held ownership rights. But it was famously ... redefined by the US Supreme Court in *Johnson v. McIntosh* (1823) when Chief Justice John Marshall, in a case without any Native parties, dramatically modified historical understandings.... [H]e declared that in relations between colonizing powers and indigenous nations, the doctrine affirmed that tribal nations were the “rightful occupants of the soil,” and acknowledged that they had “a legal as well as just claim to retain possession of it, and to use it according to their discretion.”

While on the surface, Marshall’s resurrection of the concept seems to support the case for indigenous property rights, the details of the decision were a major setback for Native peoples’ sovereign territorial rights. His interpretation gave the discovering state the exclusive or preemptive right to purchase land from the indigenous inhabitants. Even though Native nations had the right to own their lands, their right to sell was limited. In this sense, he wrote, “rights to complete sovereignty, as independent nations, were necessarily diminished.”

Abandonment of the flawed concept of the doctrine of discovery ... would be a significant first step in reformulating federal Indian policy.